The CJEU's Achmea Judgment: Getting Through the Five Stages of Grief

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Many arbitration lawyers' initial reaction to the CJEU's *Achmea* judgment resembles the first three of the famous "five stages of grief" (denial, anger, bargaining, depression and acceptance). Some deny *Achmea's* relevance under international law, others angrily dismiss it as unreasoned and politically motivated, while many attempts to "bargain" a way out for intra-EU arbitrations under the ECT and/or ICSID given their multilateral and extra-EU character.

In my view, *Achmea* is entirely consistent with both EU and international law, and applies equally to intra-EU ISDS under BITs, the ECT and ICSID. It may, therefore, be wisest to keep the stage of depression brief and accept the outcome before moving on to greener pastures.

The Autonomy and Primacy of EU Law

To restate several truisms, the TEU and TFEU ("EU Treaties") are inter-State agreements that establish an autonomous system of regional international law. The fundamental purpose – indeed, the *raison d'être* – of this system is to create a common market without internal frontiers. To this end, the CJEU has developed the doctrines of "primacy" and "effectiveness", under which any domestic legal rule – even one that enjoys constitutional status – that is incompatible with EU law must be immediately disapplied, without awaiting formal revocation [C-6/64, *Costa v. ENEL* [1964] ECR 585; C-106/77, *Simmenthal* [1978] ECR 629]. The doctrines of primacy and effectiveness are long-standing and considered by all as an integral part of the EU Treaties.

Inter se agreements of EU Member States are not exempt from primacy and effectiveness, and have always been treated just like domestic law [*E.g.* C-235/87, *Matteucci* [1988] ECR 5589, paras 19-22]. This is logical because EU Member States cannot be permitted to deviate from common market rules by treaty any more than they can by domestic legislation. It is also consistent with the international treaty law, which expressly permits States to

> (a) disapply provisions of an earlier treaty to the extent they are incompatible with those or a later treaty [VCLT Article 30(2)-(3)],
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> (b) enter into subsequent agreements concerning the interpretation and application of their previous treaties [VCLT Article 31(3)(a)], and
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> (c) subject their international agreements to other "rules of international law applicable in

the relations between the parties" [VCLT Article 31(3)(c)].

In other words, there is nothing legally wrong with EU Member States agreeing, in the EU Treaties, that those Treaties will automatically prevail over all other inconsistent international agreements between those same Member States. There is no sense in denying the international character of such an agreement or its relevance under international law.

No "Outsourcing"

Like virtually all cross-border economic activity inside the EU, intra-EU investments take place squarely within the scope of the "four freedoms" of the EU's internal market. Many areas in which investment disputes tend to arise (e.g., energy, environment, state subsidies) are heavily regulated by internal market directives, regulations and/or state aid law. Furthermore, Member State conduct is already subject to binding EU standards of protection of property rights, due process and legal certainty (including legitimate expectations), which are all relevant to the legitimacy of a particular government measure. Much as tribunals may seek to avoid them, questions of EU law therefore inevitably arise – indeed, centrally so – in many intra-EU arbitrations.[fn]*See e.g., Electrabel v. Hungary* Decision on Jurisdiction and Liability, paras 6.21-6.22, 6.70, *Micula v Romania* Award, para 691-707, 741-742, 792-793; *Wirtgen v Czech Republic* Award, paras 297-299, 337-342, 350; *Postova Banka v Greece* Award, paras 192-193, 207-208.[/fn]

Given the fundamental importance of EU law primacy and autonomy, the CJEU always firmly opposed Member States' "outsourcing" to non-EU fora disputes even potentially involving their EU law obligations. This was the case with the EEA Court in Opinion 1/91, inter-State arbitration in the *Mox Plant* case, the Patent Court in Opinion 1/09, and the European Court of Human Rights in Opinion 2/13. The *Achmea* judgment refers to this line of case law and is fully consistent with it.

Advocate-General Wathelet proposed treating ISDS tribunals as Member State courts, enabling them to refer EU law issues to the CJEU. That would have been an elegant solution indeed if it were not for one obstacle: convincing ISDS tribunals themselves. How can one be sure that a tribunal seated outside the EU and composed of non-EU lawyers would even recognise an EU law issue, let alone suspend proceedings for a CJEU reference?

It is, of course, correct that commercial arbitration is permitted under EU law, and commercial awards' compliance with EU law can be verified by EU courts at the post-award stage [*See e.g.* C-126/97 *Eco Swiss* [1999] ECR I-3055]. However, parties to a commercial contract are not under a legal duty to ensure the primacy and full effectiveness of EU law in a certain territory. By contrast, Member States conferring jurisdiction on an ISDS tribunal do have that duty, and the remote possibility of post-award control by EU courts where the tribunal may not even be seated in the EU is far from sufficient to secure compliance.

There is thus nothing shocking or "political" about the *Achmea* judgment. The dismay that ISDS lawyers now express towards the Achmea judgment mirrors similar dismay expressed four years ago by human rights lawyers towards Opinion 2/13. However, like that Opinion, the *Achmea* judgment is only a restatement of the fundamental constitutional principles that have been at the heart of CJEU's jurisprudence for many decades.[fn]*See e.g.,* D. Halberstam, *'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 German Law Journal 105 (2015)[/fn]

Multilateral Agreements

There have been suggestions since the *Achmea* judgment that it may not apply to ICSID and/or ECT

arbitration because those treaties include third countries.

However, the CJEU has always been clear that primacy also covers any intra-EU application of multilateral conventions [*See e.g.* C-301/08 *Bogiatzi* [2009] I-10185, paras 3-4, 19.]. This is consistent with TFEU Article 351, which regulates the relationship between EU law and international treaties involving third countries, as well as with VCLT Article 41(1)(b), which permits States to vary multilateral treaties as between some parties, to the extent this does not affect the rights of others.

The language of the *Achmea* judgment very clearly extends to all provisions "such as" Article 8 of the Czechoslovak-Dutch BIT. That includes the ISDS provisions of the ECT, which is, therefore, extinguished, as between EU Member States, by operation of primacy. Similarly, primacy will "turn off" the ICSID Convention to the extent it applies to intra-EU ISDS awards. Given that such application of primacy does not affect the interests of any non-EU States or their investors, neither the ECT nor ICSID can provide a safe ground on which intra-EU ISDS can continue. The CJEU is quite uncompromising and there is no place for bargaining here.

A Question of Trust

It would be unthinkable for an investor from Berlin (London, Paris) that is denied a planning permission in Munich (Manchester, Marseille) under German (British, French) administrative law to oppose the refusal outside the framework of that law, before a foreign arbitrator unfamiliar with that law, on the vague grounds that the refusal was "unfair" or "inequitable". The relationship between investors operating within a single national market and the state that regulates that market is normally governed by the administrative law of that state based on the principle of equal justice for all. After all, Texas and California cannot agree on special privileges for each other's investors independently and outside of US federal law.

Why should things be different within the European single market? The answer often given to justify this anomaly is that the courts of certain recent joiners to the EU are somehow inadequate compared to those of "old" EU Member States. Notably, no evidence of this appears in existing intra-EU awards, virtually none of which concerned any kind of judicial impropriety. However, the assumption that there is a risk of such impropriety does shed light on another ground on which the CJEU decapitated intra-EU ISDS: a breach of the EU principle of "mutual trust".

After comprehensively reforming their legal system to meet the EU's stringent accession criteria, the courts of "new" Member States are deemed to meet the standards of justice that all Europeans are entitled to expect. There are no "second-class" Member States in the EU and the principle of mutual trust implies a presumption that a Dutch investor in Slovakia can expect substantially the same quality of justice as it can in its home Member State.

If, as many complain, this is not the case, in reality, that would undoubtedly be a failure of the EU. However, it would be one that must be rectified at Union level, and in a manner that complies with Union law. ISDS lawyers can and should play a role in arriving at a solution, but the first step must surely be to understand and accept the reasons and consequences of the *Achmea* judgment, not deny, dismiss or try to bargain a way out of them.

Although the author is involved as counsel in investment disputes, the views expressed in this blog entry are the author's alone and are not to be attributed to any person the author represents or has represented in the past.